

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SALVATORE H. VITALE, IV,

Plaintiff,

vs.

SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 2:12-cv-02010-JCM-GWF

**FINDINGS AND
RECOMMENDATION**

This matter is before the Court on Plaintiff Salvatore H. Vitale, IV's Complaint to Set Aside the Final Order of the Commissioner of Social Security (#1). Plaintiff filed his Motion for Remand (#19) on June 19, 2013. The Acting Commissioner filed her Opposition to Plaintiff's Motion for Remand and Cross-Motion to Affirm the Agency's Decision (#20) on July 19, 2013 and Plaintiff filed his Reply Brief (#25) on October 17, 2013.

BACKGROUND

A. Procedural History.

Plaintiff filed an application for a period of disability, disability insurance benefits and supplemental social security income in August and November 2009, alleging that he became disabled beginning December 18, 2008. *See* Administrative Record ("AR") 101-114. The Commissioner denied Plaintiff's application initially on March 5, 2010, and upon reconsideration on June 17, 2010. AR 55-62, 67-72. Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). AR 73-74. The hearing was conducted on June 24, 2011. AR 33-50. The ALJ issued his decision on July 8, 2011 and concluded that Plaintiff was not disabled from December 15, 2008 through the date of the decision. AR 19-26. Plaintiff's request for review by the Appeals

1 Council was denied on September 17, 2012. AR 1-4. Plaintiff then commenced this action for
2 judicial review pursuant to 42 U.S.C. § 405(g), which has been referred to the undersigned
3 magistrate judge for a report of findings and recommendations pursuant to 28 U.S.C. §§ 636
4 (b)(1)(B) and (C).

5 **B. Factual Background.**

6 Plaintiff Salvatore H. Vitale, IV (hereinafter “Plaintiff” or “Vitale”) was born on February
7 26, 1982. He graduated from high school and also completed a computer technical school. AR 36,
8 249. Plaintiff’s previous employment included work as a laborer doing home remodeling and
9 construction from 2004 to 2006, production assistant providing emergency restoration service from
10 2002 to 2006, and “sandwich artist” at a Subway sandwich shop from October 27, 2006 to
11 December 15, 2008. AR 141-150. Mr. Vitale has never been married and has no children. AR 36.
12 He has resided primarily with his grandmother and her husband. AR 38. Plaintiff is 5'9" tall. In
13 November 2009, he weighed 278 pounds. AR 127. At the time of the hearing in June 2011, he
14 stated that he weighed about 315 pounds. AR 37.

15 In his November 17, 2009 Disability Report, Plaintiff stated that the following illnesses or
16 conditions limit his ability to work: Forgetfulness, loss of concentration, random muscle spasms,
17 short term memory deficits, random thought process, occasional, acute sharp pains in the back of
18 head, and muscle spasms in the fingers and eyes. Plaintiff stated that he suffers from “depressive
19 disorder calcification in the brain.” He stated that his condition has progressed moderately over the
20 last few years, and will greatly worsen as he gets older. AR 128. Plaintiff stated these problems
21 affect his ability to work because he has trouble remembering instructions and directions. He loses
22 track of time, has forgotten to wash his work uniforms and has misplaced other items needed to
23 start his job. Plaintiff also stated that he forgets to perform activities of daily living, such as eating,
24 bathing, and paying bills. He stated that he does not sleep much and his energy level fluctuates
25 between highs and lows. AR 128.

26 **1. Mental Health Treatment Records: September 2000 to October 2005.**

27 The administrative record contains psychiatric treatment records for Mr. Vitale dating back
28 to September 22, 2000 when he was 18 years old and residing in Pennsylvania. AR 229-230. On

that date, a psychiatrist provided the following diagnosis: Axis I: Major Depression with Psychotic Features; Axis II: Schizoid Personality Traits; Axis III: Obesity, History of Hypertension, Axis IV: Illness of his father, Past abuse; Axis V: GAF: 50.¹ The psychiatrist recommended that Mr. Vitale be treated for depression and other symptoms on an outpatient basis and that a CT scan of his head be obtained due to his complaints of headaches. The psychiatrist also prescribed Celexa and discussed the possibility of prescribing anti-psychotic medications after more information and testing was obtained. AR 229.

On June 9, 2003, Plaintiff was seen for an initial psychiatric evaluation at Northeast Counseling Services in Nanticoke, Pennsylvania. AR 227-228. His chief complaint was depression. The report noted that “[t]he patient has been involved in mental health services here off and on since September 2000.” AR 227. Plaintiff was taking Lexapro, 10 mg daily. He reported that he was doing well, but had a past history of depression, inappropriate behavior and social isolation. *Id.* Under “Medical History,” Plaintiff was noted to have “Anemia, thyroid problems, calcification on his basal ganglia; he had an MRI [?] done in July of 2001 and apparently

¹ “GAF scores ‘are used by mental health clinicians and doctors to rate the social, occupational and psychological functioning of adults.’” *Sweeney v. Commissioner of Social Sec.*, 847 F.Supp.2d 797, 802 (W.D.Pa. 2012), citing *Irizarry v. Barnhart*, 233 Fed.Appx. 189, 190 n. 1 (3d Cir. 2007). “‘The GAF scale, designed by the American Psychiatric Association, ranges from 1 to 100, with a score of 1 being the lowest and 100 being the highest.’” *Id.*, citing *West v. Astrue*, 2010 WL 1659712, at *4 (E.D.Pa. Apr. 26, 2010). “‘An individual with a GAF score of 60 may have ‘[m]oderate symptoms’ or ‘moderate difficulty in social, occupational, or school functioning;’ of 50 may have ‘[s]erious symptoms (e.g., suicidal ideation)’ or ‘impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job);’ of 40 may have ‘[s]ome impairment in reality testing or communication’ or ‘major impairment in several areas, such as work or school, family relations, judgment, thinking or mood’” *Gallagher v. Astrue*, 2012 WL 2344455, at *10 n. 3 (W.D.Pa. 2012), citing *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* (DSM–IV–TR) 34 (4th ed. 2000); *Bracciodieta–Nelson*, 782 F.Supp.2d 152, 157 (W.D.Pa. 2011).”

Despite its usefulness as a tool for psychological assessment, courts in the Ninth Circuit hold that a GAF score is not determinative of mental disability or limitation for social security purposes, and an ALJ is not bound to consider it in determining whether a claimant is disabled by a mental impairment. *Hammons v. Colvin*, 2013 WL 5786092, at *10 (W.D.Wash. 2013), citing *McFarland v. Astrue*, 288 Fed. Appx. 357, 359 (9th Cir.2008) and *Orellana v. Astrue*, 2008 WL 398834, at *9 (E.D.Cal. Feb.12, 2008). *See also Mann v. Astrue*, 2009 WL 2246350, at *1 (C.D.Cal. 2009) and *Thomas v. Astrue*, 2009 WL 141488, at *6 (C.D.Cal. 2009). In this case, the ALJ considered Plaintiff’s GAF scores of 65 to denote mild symptoms.

1 it was found to be normal.” Id. The report stated that Plaintiff was being followed by a Dr. Adler
2 and was receiving Synthroid medication. Plaintiff also reported a history of high blood pressure.
3 Id.

4 Under “Mental Status Examination,” the psychiatrist stated:

5 When seen, the patient is generally awake, alert and cooperative.
6 Gait is fair. Personal hygiene is fair. The patient is overweight.
7 Speech is clear, coherent, relevant, spontaneous and productive.
8 Reaction time is in the average range. Anxiety level is moderate.
9 Affect is guarded. No suicidal intent, thoughts or plans. No
10 indication of any hallucinations. Short term plans are questionable.
11 Memory functioning is good. Retention and recall are fair. Attention
12 and concentration are fair. Intellectual functioning needs to be
13 evaluated further. Orientation is good to time, place and person.
14 Judgment and insight are questionable. Reliability is fair.

15 AR 227.

16 The psychiatrist’s diagnosis was as follows: Axis I: Major Depression by history,
17 Relationship problems, NOS; Axis II: Nothing; Axis III: As mentioned; Axis IV: Unspecified; Axis
18 V: GAF: 40. AR 228. The psychiatrist recommended that Plaintiff’s medication be monitored and
19 that he receive counseling. Id.

20 Mr. Vitale received treatment and counseling at Northeast Counseling Services through
21 September 19, 2005. AR 206-226. The evaluation reports indicate that his mental condition
22 improved during the initial months of therapy. His GAF score, for example, improved from 40 on
23 June 9, 2003 to 55 on October 22, 2003. AR 221, 224, 226. On December 3, 2003, the psychiatrist
24 noted, however, that Plaintiff was not compliant with his treatment regimen and he had not been
25 taking his medication appropriately. AR 220. His GAF score was 45. AR 219. Although Plaintiff
26 continued to fail to take his medications regularly or to consistently attend counseling, his mental
27 condition improved and he had a GAF score of 50 on January 7, 2004. AR 218. This status
28 continued through June 25, 2004. AR 215. Plaintiff also began performing renovation work and
was seeking to move out of his grandmother’s residence and establish greater independence. AR
215. From January 2004 through June 2005, Plaintiff’s depression and anxiety levels varied. His
GAF scores ranged between 50 and 45. AR 209-218.

...

1 Plaintiff's last psychiatric evaluation at Northeast Counseling Services occurred on
2 September 19, 2005. Plaintiff reported that he had been having episodes of depression related to
3 his medical condition. He was worried about some special tests that had been done. However, on
4 consulting Dr. Adler, it was determined that Plaintiff was having his thyroid checked. Plaintiff was
5 still concerned that he has calcification in his brain and wanted to go to a neurologist. The
6 psychologist noted that "[c]urrently there are no major complications in the program reported and
7 no reports of any agitation or aggressive behavior at home. His sleep is fair. The patient remains
8 overweight." AR 206. Under "Mental Status Examination," the psychiatrist noted that "[m]emory
9 functioning remains good. Retention and recall are good. Attention and concentration are fair.
10 Intellectual functioning is probably unchanged since last seen. Orientation is good to time, place,
11 and person. Judgment and insight are questionable. Reliability is fair." AR 206.

12 The Plaintiff was discharged from Northeast Counseling Services on October 19, 2005
13 because he was moving to Louisiana to work on flood relief efforts. AR 231. There are no records
14 regarding Plaintiff's mental or physical health for the time period between October 19, 2005 and
15 February 22, 2010.

16 **2. February 22, 2010 Mental Status Examination by Miles Morgan, Psy.D.**

17 On February 22, 2010, Mr. Vitale was evaluated by Dr. Miles Morgan, psychologist, at the
18 request of the Bureau of Disability Adjudication. AR 248. Mr. Vitale told Dr. Morgan that prior to
19 2006, he worked for a family construction business for five years. His job duties included general
20 construction and cleaning. The business closed and Plaintiff moved with his family to Nevada in
21 2006. Plaintiff worked as a sandwich maker at a Subway sandwich shop for two years. He was
22 fired due to memory problems and being late for work. He indicated that he did not correctly count
23 money. After losing his job at Subway, Plaintiff returned to Pennsylvania, but could not find work
24 there and returned to Nevada. He applied again at Subway, but was not rehired. Plaintiff had not
25 applied for other employment because of his concerns about his cognitive functioning. AR 250.

26 Dr. Morgan performed a mental status examination of the Plaintiff. AR 250-254. Under
27 the subsection of his report titled "Ability to Understand Instructions," Dr Morgan stated that Mr.
28 Vitale "has the ability to understand a limited variety of complex instructions. He should have no

1 difficulty understanding detailed or simple instructions. He is estimated to function intellectually
2 within an average range.” AR 254. Under “Memory for Instructions,” Dr. Morgan stated that
3 Plaintiff had mild to moderate deficits with immediate and working memory. “He would be unable
4 to remember complex instructions. He would likely struggle to recall detailed instructions as well
5 but does report successfully using memory devices for assistance. He should be able to remember
6 simple one or two step instructions without difficulty.” Id. Under “Ability to Work on a Sustained
7 Basis,” Dr. Morgan stated:

8 This claimant does report symptoms of depression but these are not
9 at a level of severity that would prevent him from working on a full-
10 time, sustained basis. This claimant indicates that he is primarily
11 unable to work at this point due to cognitive deficits that are
12 associated with idiopathic basal ganglia calcifications. This claimant
13 will require medical evaluation and comment in regard to the extent
14 of cognitive impairment and subsequent disability that this type of
15 condition would be expected to create.

16 AR 255.

17 Dr. Morgan made the following diagnosis: Axis I: Mood Disorder due to Familial
18 Idiopathic Basal Ganglia Calcifications; Axis II: No diagnosis; Axis III: Idiopathic Basal Ganglia
19 Calcifications, obesity; Axis IV: Psychosocial Stressors: Economic, current living situation,
20 occupational, lack of access to appropriate medical care. Axis V: Current GAF: 65. GAF Past
21 Year: 65. AR 255. Dr. Morgan stated that Plaintiff’s “prognosis in regard to mental health issues
22 is good assuming he is willing to access appropriate mental health care in the form of outpatient
23 counseling and he does not experience any further reported declines with physical or cognitive
24 functioning.” AR 255.

25 **3. State Agency Psychologist’s Mental Residual Functional Capacity Assessment.**

26 On March 3, 2010, state agency psychologist Pastora Roldan, Ph.D. provided a rating of
27 Plaintiff’s functional limitations and an assessment of his mental residual functional capacity. AR
28 256-273. Dr. Roldan stated that Plaintiff had a medically determinable impairment of “Mood
Disorder due to a General Medical Condition; Depressive. AR 259. Under the “B” Criteria of the
Listings, Dr. Roldan stated that Plaintiff had mild restriction of activities of daily living, no
difficulties in maintaining social functioning, moderate difficulties in maintaining concentration,

1 persistence or pace, and no episodes of decompensation of extended duration. AR 266. The
2 evidence did not establish the presence of “C” criteria. AR 267.

3 In assessing Plaintiff’s mental residual functional capacity, Dr. Roldan reported that he was
4 not significantly limited in the ability to remember locations and work like procedures and to
5 understand and remember very short and simple instructions. He was moderately limited in the
6 ability to understand and remember detailed instructions. In regard to sustained concentration and
7 persistence, Plaintiff was not significantly limited in the ability to carry out very short and simple
8 instructions, but was moderately limited in the ability to carry out detailed instructions and to
9 maintain attention and concentration for extended periods. He was not significantly limited in the
10 ability to perform activities within a schedule, maintain regular attendance, and be punctual within
11 customary tolerances; sustain an ordinary routine without special supervision; work in coordination
12 with or proximity to others without being distracted; and to make simple work-related decisions.
13 AR 270. Dr. Roldan also found that Plaintiff was not significantly limited in the ability to
14 complete a normal workday and workweek without interruptions from psychologically based
15 symptoms and to perform at a consistent pace without an unreasonable number and length of rest
16 periods. AR 271.

17 Dr. Roldan also found that Plaintiff was not significantly limited in social interaction. Id.
18 Under “Adaption,” she found that Plaintiff was not significantly limited in the ability to respond
19 appropriately to changes in the work setting, to be aware of normal hazards and take appropriate
20 precautions, and to travel in unfamiliar places or use public transportation. AR 271. She found
21 that he was moderately limited in the ability to set realistic goals or make plans independently of
22 others. AR 271.

23 **4. State Agency Physician’s Physical Mental Residual Functional Capacity**
24 **Assessment.**

25 On June 13, 2010, State Agency physician Navdeep S. Dhaliwal, M.D. prepared a physical
26 residual functional capacity assessment. AR 298-305. Dr. Dhaliwal’s specific findings regarding
27 Plaintiff’s physical residual functional capacity are not in dispute and the Court therefore does not
28 set them forth herein. Dr. Dhaliwal did note that the “[d]iagnosis of Idiopathic basal ganglia

1 calcification and problems from this is not clear in this case. History of seizures is also not clear in
2 this case. Suggest medium RFC in this case.” AR 305.

3 **5. UMC Clinic Records.**

4 Plaintiff was seen at the University Medical Center (UMC), Lied Out-Patient Clinic on May
5 18, 2010. AR 284-285. He informed the clinic that he had been diagnosed with familial idiopathic
6 basal ganglia calcifications in 2001, and also had a history of thyroid problems. Blood work and
7 urinalysis studies were obtained and the results were reported on May 26, 2010. AR 286-289.
8 Plaintiff was seen in follow-up on July 15, 2010. He informed the clinic physician, Dr. Selgestad,
9 that he had previously been “diagnosed with familial idiopathic ganglionic calcification, which is
10 allegedly a progressive brain disease.” AR 325. Dr. Selgestad noted that “[t]he patient also had a
11 CT scan of the brain with and without contrast and that was normal.” AR 325. He stated that
12 Plaintiff would be referred to neurology. Id. Dr. Selgestad reported on August 12, 2010, however,
13 that the neurology department declined to see the Plaintiff. AR 322.

14 Plaintiff returned to the UMC clinic on January 21, 2011. The clinic noted under “Past
15 Medical History,” the following conditions: “2. Basal ganglion calcifications felt to be benign
16 based on neurological assessment. 3. Short-term memory loss felt to be secondary to mood
17 disorder at this time.” Plaintiff was directed to follow-up with mental health for these problems.
18 AR 319.

19 **6. Southern Nevada Adult Mental Health Services (“SNAMHS”) Clinic.**

20 Mr. Vitale was initially seen at the SNAMHS clinic on May 26, 2010. AR 291. The nurse
21 noted that he was alert and oriented, had good eye contact, logical thought and an appropriate
22 affect. Plaintiff underwent a psychiatric evaluation on August 11, 2010. AR 293. He reported
23 increased difficulty with memory, “slow thinking” and low self-esteem. Id. He stated that he had
24 undergone a CT brain scan eight years ago and was diagnosed with Familial Idiopathic Basal
25 Ganglia Calcifications. He stated that this was a degenerative brain disease “like dementia.” The
26 SNAMHS psychologist performed a mental status examination. AR 294-295. He noted that
27 Plaintiff was appropriately groomed and dressed, and was polite and cooperative. Plaintiff’s
28 speech was slow and mildly dysarthric. His mood was slightly depressed and his affect was

1 restricted. Plaintiff's memory was "5/5 immed. 1/5@ 5 min. (grossly impaired); no improvement
2 with prompt." AR 295. Plaintiff's general fund of knowledge and of current events was good. He
3 had no evident problems with naming objects. He followed 3-step commands correctly. He made
4 errors on serial 3 subtraction and could not successfully recite the days of week in reverse. The
5 psychologist gave Plaintiff a current GAF score of 57 with a twelve month high score of 57. The
6 psychologist prescribed a trial of Pristiq 50 mg, Rozerem and recommended that Plaintiff attend
7 group therapy. AR 296.

8 Plaintiff was seen in follow-up on September 22, 2010. He reported that his current
9 medications were effective and his grandmother had observed improvement in him. His mood was
10 better and his affect was appropriate. On December 9, 2010, Plaintiff reported that the medications
11 had been helpful. He denied any sustained depressive feelings and did not complain of side effects.
12 He also reported that he was sleeping 8 hours a night. On March 4, 2011, Plaintiff reported a
13 positive response to the Pristiq medication, but still had residual low motivation/interests, social
14 isolation (decreased) and low physical energy. He reported that he was sleeping well. The record
15 also indicated chronic poor short-term memory. AR 312.

16 On May 17, 2011, Plaintiff reported that he "continued to be essentially free of
17 depressive/anxiety [symptoms]." AR 308. He was sleeping fairly well and his medical condition
18 appeared stable. Under "Mental Status Exam," Plaintiff was noted to be alert to time and place,
19 and had good eye contact. His mood was good and his affect was appropriate. Plaintiff's speech
20 was "mildly dysarthric/slow (chronic)." His thought process was linear. Cognitive functioning
21 was grossly intact based on history/presentation, but he still had short-term memory impairment
22 which was chronic. Plaintiff had good insight and judgment. AR 308.

23 **7. Function Reports and Plaintiff's Hearing Testimony.**

24 Mr. Vitale completed a Social Security Function Report on January 4, 2010. AR 159-168.
25 He stated that his daily activities included playing games, watching television, performing
26 household chores, going for car rides, and going to his aunt's house to play with her dogs. AR 159.
27 He stated that he had difficulties staying on task, keeping a schedule and not being dependent on
28 others. He reported poor sleep. He would forget to do laundry, and would also forget to perform

1 personal hygiene tasks such as showering and shaving. He also needed reminders to take
2 medication. AR 160. Plaintiff indicated that he does some cooking and house and yard work, but
3 again indicated that he would get sidetracked doing these activities and would need reminders to
4 complete them. AR 161. He went shopping once a month. He stated that he was not able to pay
5 bills, count change, or handle a savings book, checking account or money orders. AR 162. Under
6 social activities, he stated that he communicates with friends on-line on a daily basis. He goes to
7 Wal-Mart, the grocery store, casinos, buffets and his aunt's house on a regular basis. AR 163.
8 Under the section of the report concerning abilities, Plaintiff emphasized his problems with short-
9 term memory loss, forgetfulness and difficulty following instructions.

10 Mr. Vitale's aunt, Kimberly Vincent, also completed a Function Report on January 1, 2010
11 that provided information about Mr. Vitale's activities of daily living and limitations that was
12 consistent with that provided in Plaintiff's report. AR 151-158

13 Mr. Vitale's testimony during the June 24, 2011 hearing regarding his activities of daily
14 living and mental limitations was generally consistent with the information contained in his
15 Function Report. In response to the ALJ's question as why he cannot work, Mr. Vitale testified:

16 But with my condition that I have, my memory is getting worse that I
17 feel -- my short-term memory and I forget to do a lot of important
18 things that's required of jobs like my last job, for instance, was at
19 Subway and I was required to handle money and do food counts and
20 stuff like that and towards the end of when I stopped working, things
were getting very tough that I would forget the store keys, I would
misplace them, the safe would be short of money, and things of that
nature.

21 AR 42.

22 Mr. Vitale testified that the prior manager had been sympathetic to his mental problems and
23 covered for him. AR 45. The second manager, however, was not sympathetic and told him that he
24 would have to pay back the money lost in the cash shortage. He therefore quit. Id.

25 **8. Vocational Expert's Testimony.**

26 Vocational expert Kourtney Layton testified at the June 24, 2011 hearing. The ALJ asked
27 Ms. Layton the following question:

28 ...

1 Q. I'll hypothecate a person of claimant's age, education and
 2 past work experience at the medium level; only occasionally
 3 climbing ropes, ladders, or scaffolding; no concentrated exposure to
 4 hazards by which I mean unprotected heights and dangerous
 machinery; no driving; he said he doesn't have a license because he
 couldn't pass the test basically; and in the mental realm there will be
 four moderate limits.

5 ALJ: 4F², counsel.

6 BY THE ADMINISTRATIVE LAW JUDGE:

7 Q. A3, B5, B6, and D as in dog 20. Take the time you need
 8 to digest all of those and I'll ask you some of the usual questions.

9 A. I'm ready, Your Honor.

10 Q. Any of the past work available for such a person?

11 A. Yes, Your Honor, one job.

12 Q. All right. Which one?

13 A. That is sandwich maker, 317.664-014; medium; SVP of 2.

14 Q. Okay.

15 AR 47-48.

16 The ALJ then turned to Plaintiff's legal representative to see if she wished to question the
 17 vocational expert. The legal representative appeared somewhat confused as to whether the ALJ
 18 had asked a hypothetical question. The legal representative then asked the vocational expert
 19 whether Plaintiff could perform his past relevant work. AR 48-49. The vocational expert
 20 responded: "Just for the job of sandwich maker." AR 49. The legal representative asked if the
 21 hypothetical person would be able to perform that job, or any other work, if he "would be off task
 22 for simple and repetitive tasks 40% percent of the time." The vocational expert responded no. AR
 23 49.

24 **C. Administrative Law Judge's July 8, 2011 Decision.**

25 The ALJ applied the five-step sequential evaluation process established by the Social
 26 Security Administration in determining whether Plaintiff was disabled. At step one, the ALJ found

27
 28 ² Exhibit 4F was Dr. Roldan's March 3, 2010 Mental Residual Functional Capacity Assessment.

1 that Plaintiff met the insured status requirements of the Social Security Act through December 31,
2 2009 and that Plaintiff had not engaged in substantial gainful activity since December 15, 2008, the
3 alleged onset date of his disability. AR 19. At step two, the ALJ found that Plaintiff had the
4 following severe impairments: Familial idiopathic ganglia calcifications with secondary onset of
5 short-term memory deficits, major depressive disorder, and obesity (20 CFR 404.1520(c) and
6 416.920(c)). AR 21.

7 At step three, the ALJ found that Plaintiff did not have an impairment or combination of
8 impairments that met or medically equaled one of the listed impairments in 20 CFR Part 404,
9 Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and
10 416.926). AR 22. In support of this finding, the ALJ relied on the mental residual functional
11 capacity assessment prepared by Dr. Roldan, the findings of which are set forth in the ALJ's
12 decision. AR 22-23. The ALJ also considered Plaintiff's obesity, which fell into the category of
13 morbid obesity in conjunction with his other severe impairments. Id.

14 Prior to step four, the ALJ found that Plaintiff had the residual functional capacity to
15 perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c), including lifting up to 50
16 pounds occasionally, 25 pounds frequently, standing and/or walking up to 6 hours in an 8-hour
17 workday, with the following restrictions: Plaintiff can occasionally climb ladders/ropes/scaffolds,
18 should avoid concentrated exposure to hazardous machinery, heights, and is precluded from
19 driving. The ALJ further found that Plaintiff "would have moderate limitations in the ability to
20 understand, remember and carry out detailed instructions, maintain attention and concentration for
21 extended periods, and set realistic goals or make plans independent of others." AR 23.

22 The ALJ considered Plaintiff's disability reports and hearing testimony regarding the
23 severity of his mental symptoms and limitations, but concluded that "the claimant's statements
24 concerning the intensity, persistence and limiting effects of these symptoms are not credible to the
25 extent they are inconsistent with the above residual functional capacity assessment." AR 23-24.
26 The ALJ reviewed Dr. Morgan's psychological evaluation report and the mental health and medical
27 treatment records. AR 24-25. The ALJ concluded that the "course of medical treatment in this
28 case does not bolster claimant's credibility with respect to his degree of pain and other subject

1 complaints.” AR 25. He stated that the Plaintiff had not received the type of medical or mental
2 health treatment one would expect for a totally disabled individual. He further noted that Plaintiff’s
3 symptoms improved with medications. The ALJ also noted that despite his short term memory
4 problems, Plaintiff had fairly full activities of daily living. “He checks e-mail and internet sites that
5 involve social networking, talks to individuals online, plays games on computer, watches
6 television; does household chores including taking out the [garbage], loading the dishwasher,
7 vacuuming, pulling weed, helping cook and complete his laundry.” AR 25.

8 The ALJ also noted Kimberly Vincent’s function report, but did not attribute significant
9 weight to her opinions regarding Plaintiff’s condition because the description of Plaintiff’s
10 limitations was not supported by the medical records. AR 25. The ALJ gave substantial weight to
11 the opinion of the State Agency review physician, Dr. Dhaliwal. AR 26.

12 At step four, the ALJ found that Plaintiff is capable of performing his past relevant work as
13 a sandwich maker. In so finding, the ALJ stated that “[u]sing the Dictionary of Occupational Titles
14 as a reference, the vocational expert testified that the claimant’s past work as a sandwich maker
15 (DOT 314.664-014) which is unskilled work, performed at the medium level of physical exertion.
16 Based on the residual functional capacity of a reduced range of medium work the claimant is able
17 to perform his past relevant work (vocational expert testimony). Pursuant to SSR 00-4p, the
18 vocational expert’s testimony is consistent with the information contained in the DOT.” AR 26.

19 The ALJ therefore concluded that Plaintiff was not disabled as defined by the Social
20 Security Act from December 15, 2008 through the date of the decision (20 CFR 404.1520(f) and
21 416.920(f)). AR 26.

22 **DISCUSSION**

23 **I. Standard of Review**

24 A federal court’s review of an ALJ’s decision is limited to determining only (1) whether the
25 ALJ’s findings were supported by substantial evidence and (2) whether the ALJ applied the proper
26 legal standards. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *Delorme v. Sullivan*, 924
27 F.2d 841, 846 (9th Cir. 1991). The Ninth Circuit has defined substantial evidence as “more than a
28 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion.” *Woish v. Apfel*, 2000 WL 1175584 (N.D. Cal. 2000) (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)); *see also Lewis v. Apfel*, 236 F.3d 503 (9th Cir. 2001). The Court must look to the record as a whole and consider both adverse and supporting evidence. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Where the factual findings of the Commissioner of Social Security are supported by substantial evidence, the District Court must accept them as conclusive. 42 U.S.C. § 405(g). Hence, where the evidence may be open to more than one rational interpretation, the Court is required to uphold the decision. *Moore v. Apfel*, 216 F.3d 864, 871 (9th Cir. 2000) (quoting *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984)). *See also Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court may not substitute its judgment for that of the ALJ if the evidence can reasonably support reversal or affirmation of the ALJ’s decision. *Flaten v. Sec’y of Health and Human Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

It is incumbent on the ALJ to make specific findings so that the court need not speculate as to the findings. *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981), citing *Baerga v. Richardson*, 500 F.2d 309 (3rd Cir. 1974). In order to enable the court to properly determine whether the Commissioner’s decision is supported by substantial evidence, the ALJ’s findings “should be as comprehensive and analytical as feasible and, where appropriate, should include a statement of subordinate factual foundations on which the ultimate factual conclusions are based.” *Lewin*, 654 F.2d at 635.

In reviewing the administrative decision, the District Court has the power to enter “a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). In the alternative, the District Court “may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” *Id.*

II. Disability Evaluation Process

To qualify for disability benefits under the Social Security Act, a claimant must show that:

(a) he/she suffers from a medically determinable physical or mental impairment that can be

1 expected to result in death or that has lasted or can be expected to last for a continuous period of
2 not less than twelve months; and (b) the impairment renders the claimant incapable of performing
3 the work that the claimant previously performed and incapable of performing any other substantial
4 gainful employment that exists in the national economy. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th
5 Cir. 1999); *see also* 42 U.S.C. § 423(d)(2)(A). The claimant has the initial burden of proving
6 disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995), *cert. denied*, 517 U.S. 1122
7 (1996). If the claimant establishes an inability to perform his or her prior work, the burden shifts to
8 the Commissioner to show that the claimant can perform a significant number of other jobs that
9 exist in the national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074-75 (9th Cir. 2007).

10 Social Security disability claims are evaluated under a five-step sequential evaluation
11 procedure. *See* 20 C.F.R. § 404.1520(a)-(f). *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir.
12 2001). The claimant carries the burden with respect to steps one through four. *Tackett v. Apfel*,
13 180 F.3d 1094, 1098 (9th Cir. 1999). If a claimant is found to be disabled, or not disabled, at any
14 point during the process, then no further assessment is necessary. 20 C.F.R. § 404.1520(a). Under
15 the first step, the Secretary determines whether a claimant is currently engaged in substantial
16 gainful activity. *Id.* § 416.920(b). If so, the claimant is not considered disabled. *Id.* § 404.1520(b).
17 Second, the Secretary determines whether the claimant's impairment is severe. *Id.* § 416.920(c). If
18 the impairment is not severe, the claimant is not considered disabled. *Id.* § 404.152(c). Third, the
19 claimant's impairment is compared to the "List of Impairments" found at 20 C.F.R. § 404, Subpt.
20 P, App. 1. The claimant will be found disabled if the claimant's impairment meets or equals a
21 listed impairment. *Id.* § 404.1520(d). If a listed impairment is not met or equaled, the fourth
22 inquiry is whether the claimant can perform past relevant work. *Id.* § 416.920(e). If the claimant
23 can engage in past relevant work, then no disability exists. *Id.* § 404.1520(e). If the claimant
24 cannot perform past relevant work, the Secretary has the burden of proof at the fifth and final step
25 to demonstrate that the claimant is able to perform other kinds of work. *Id.* § 404.1520(f). If the
26 Secretary cannot meet his or her burden, the claimant is entitled to disability benefits. *Id.* §
27 404.1520(a).

28 ...

1 **III. Whether the ALJ Erred at Step Four of the Sequential Process.**

2 Plaintiff asserts that he suffers from familial idiopathic basal ganglia calcification which is
3 “a rare progressive brain disorder.” *Motion to Remand* (#19), pg. 5. Plaintiff further states that the
4 medical records show that he started receiving treatment for this condition in September 2000. *Id.*
5 In fact, there are no medical reports in the administrative record showing that Plaintiff was actually
6 diagnosed with familial idiopathic basal ganglia calcification prior to 2010 or that he was
7 experiencing cognitive problems as a result of this alleged disorder. Plaintiff informed the
8 Northeast Counseling Services psychiatrists who evaluated and treated him that he had been
9 diagnosed with this condition. The psychiatrists did not dispute this alleged diagnosis. It appears,
10 however, that they treated Plaintiff for depression and mood disorder, and not for a diagnosed
11 condition of idiopathic basal ganglia calcification.

12 In 2010, Plaintiff also informed the UMC clinic and the SNAMHS clinic that he suffered
13 from familial idiopathic basal ganglia calcification. The UMC clinic physician noted, however,
14 that Plaintiff had a CT scan of the brain which was normal. AR 325. Another UMC clinic
15 physician reported that Plaintiff’s basal ganglion calcifications were felt to be benign based on
16 neurological assessment. AR 319. Dr. Dhaliwal also noted that the diagnosis of idiopathic basal
17 ganglia calcification and problems associated with the condition was not clear. AR 305. Again, it
18 does not appear that Plaintiff received any specific treatment for this alleged condition. The
19 medication treatment that he received from the SNAMHS clinic, however, appeared to result in the
20 improvement of his depression and related symptoms. The ALJ, in any event, listed familial
21 idiopathic basal ganglia calcification as a severe impairment at step two of the sequential process.
22 AR 21.

23 Plaintiff argues that the medical records, together with his own statements and testimony
24 regarding the severity of his cognitive problems, support the conclusion that he is unable to work.
25 None of the physicians who examined or treated Plaintiff, except for Dr. Morgan, rendered
26 opinions about his mental capacity to perform work related tasks. As noted, the Northeast
27 Counseling Services and the SNAMHS clinic records show that Plaintiff’s depression and other
28 mental symptoms improved with treatment. It also appears that his condition deteriorated to some

1 extent when he went without treatment or failed to follow it on a regular basis. There are no
2 medical opinions in the record that conflict with Dr. Morgan's findings regarding Plaintiff's ability
3 to perform work related tasks. Dr. Roldan's mental residual functional capacity assessment also
4 appears to be consistent with Dr. Morgan's findings.

5 Plaintiff, at least indirectly, attacks the ALJ's decision on the grounds that he did not
6 provide adequate reasons for rejecting the credibility of Plaintiff's statements and testimony
7 regarding the severity of his cognitive problems. *Valentine v. Comm'r of Soc. Sec. Admin.*, 574
8 F.3d 685, 693 (2009) states that in the absence of affirmative evidence showing that the claimant is
9 malingering, the Commissioner's reasons for rejecting the claimant's testimony must be clear and
10 convincing. The ALJ must cite the reasons why the claimant's testimony is unpersuasive. He must
11 also specifically identify what testimony is credible and what evidence undermines the claimant's
12 complaints. Questions of credibility and resolutions of conflicts in the testimony are functions
13 solely for the Commissioner. *See also Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F. 3d 595, 599
14 (9th Cir. 1999).

15 The ALJ may not reject a claimant's subjective complaints based solely on the lack of
16 medical evidence to fully corroborate the severity of pain. *Burch v. Barnhart*, 400 F.3d 676, 680
17 (9th Cir. 2005) and *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 884-85 (9th Cir. 2006). He must,
18 instead, identify other evidence in the record that supports the conclusion that the claimant's
19 testimony is not credible. Here, the ALJ referenced not only the medical evidence regarding
20 Plaintiff's mental impairments, he also referenced Plaintiff's ability to engage in the various
21 activities of daily living, including using the computer to play games and communicate with others,
22 which the ALJ found to be inconsistent with Plaintiff's statements regarding the severity of his
23 cognitive limitations, in particular, short-term memory loss. The ALJ's credibility finding is
24 therefore reasonably supported by the specific evidence cited in his decision.

25 Plaintiff's principal attack on the ALJ's decision is based on the argument that the ALJ
26 failed to present a proper hypothetical question to the vocational expert which included, on the
27 record, all of the limitations or assumptions that the vocational expert was asked to consider in
28 testifying whether the claimant was capable of performing his past relevant work. In support of his

1 argument, Plaintiff cites “HALLEX 1-2-555.” *Motion to Remand* (#19), pg. 9. HALLEX is the
 2 acronym for the Social Security Administration’s “Hearings, Appeals and Litigation Law Manual.”
 3 Section 1-2-5-55 of that manual states: “If certain VE testimony is based on an assumption, the VE
 4 or ALJ must clearly describe the assumption on the record.”

5 The HALLEX is not binding on the court, but may be looked to for guidance on particular
 6 matters addressed in the manual. *Bowie v. Commissioner of Social Sec.*, 539 F.3d 395, 399 (6th
 7 Cir. 2008), *Turner v. Astrue*, 2011 WL 2783832, *4 (S.D.Ohio 2011). *See also Melvin v. Astrue*,
 8 602 F.Supp.2d 694, 704 (E.D.N.C. 2009) (HALLEX is an internal guidance tool which lacks the
 9 force of law). The statement in Section 1-2-5-55 that the assumptions upon which the vocational
 10 expert’s opinion is based must be clearly described on the record, is consistent with Ninth Circuit
 11 case law. In this regard, *Hill v. Astrue*, 698 F.3d 1153, 1161-62 (9th Cir. 2012) states as follows:

12 The ALJ may meet his burden at step five by asking a vocational
 13 expert a hypothetical question based on medical assumptions
 14 supported by substantial evidence in the record and reflecting all the
 15 claimant’s limitations, both physical and mental, supported by the
 16 record. *See Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685,
 17 690 (9th Cir. 2009); *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir.
 18 2002); *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573,
 19 578 (9th Cir. 1988) (Pregerson, J., concurring) (“The ALJ’s depiction
 of the claimant’s disability must be accurate, detailed, and supported
 by the medical record.”). “If a vocational expert’s hypothetical does
 not reflect all of the claimant’s limitations, then the expert’s
 testimony has no evidentiary value to support a finding that the
 claimant can adequately perform jobs in the national economy.”
Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993) (internal
 quotation marks and citations omitted).

20 *See also Gamer v. Secretary of Health and Human Services*, 815 F.2d 1275, 1279 (9th Cir.
 21 1987) (“Hypothetical questions asked of vocational experts must ‘set out all of the claimant’s
 22 impairments.’”); *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989) (same); and *Tackett v.*
 23 *Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1094) (same). The same requirements should also apply
 24 where the ALJ relies on vocational expert testimony at step four of the sequential process to
 25 conclude that Plaintiff can perform her past relevant work. The Ninth Circuit has also held,
 26 pursuant to SSR 00-4p, that the ALJ has an affirmative responsibility to ask the vocational expert if
 27 the evidence he or she has provided is consistent with the *Dictionary of Occupational Titles* and
 28 ...

1 obtain a reasonable explanation of any apparent conflict. *Massachi v. Astrue*, 486 F.3d 1149, 1152-
2 53 (9th Cir. 2007).

3 In this case, the ALJ asked the vocational expert to assume a person of Plaintiff's age,
4 education and past work experience at the medium level, who would be limited in climbing, not
5 exposed to hazards such as unprotected heights and dangerous machinery, and who does not drive.
6 AR 47. The ALJ further stated: "and in the mental health realm there will be four moderate limits."
7 Id. The ALJ then referred the vocational expert to certain hearing exhibits and requested that she
8 review them. AR 47-48. After apparently completing her review, the vocational expert testified
9 that Plaintiff would be able to perform his past work as a sandwich maker, which has a Dictionary
10 of Occupational Titles (DOT) code number of 37.664.-014. Id. Neither the ALJ, nor the
11 vocational expert, described on the record the four moderate limits "in the mental health realm"
12 that applied to Plaintiff's ability to perform medium work.

13 It might be possible to infer from a review of the exhibits referenced by the ALJ, what
14 moderate limitations the ALJ intended to apply to Plaintiff's ability to perform medium level work.
15 The ALJ stated in his subsequent decision, for example, that Plaintiff "would have moderate
16 limitations in the ability to understand, remember, and carry out detailed instructions, maintain
17 attention and concentration for extended periods, and set realistic goals or make plans
18 independently of others." AR 23. It is speculation, however, to conclude that the vocational
19 expert recognized the same limitations intended by the ALJ and incorporated those limitations into
20 her answer. Because Ninth Circuit case law clearly requires that all impairments or limitations on
21 the Plaintiff's ability to work be set out in the hypothetical question, the vocational expert
22 testimony in this case cannot be relied upon to support the ALJ's conclusion that Plaintiff can
23 perform his past work as a sandwich maker.

24 CONCLUSION

25 *Hill v. Astrue* states that "[r]emand for further proceedings is appropriate where there are
26 outstanding issues that must be resolved before a determination can be made, and it is not clear
27 from the record that the ALJ would be required to find the claimant disabled if all of the evidence
28 were properly evaluated." 698 F.3d at 1162. In this case, vocational expert testimony, based on a

properly posed hypothetical question, may still establish that Plaintiff is able to perform his past relevant work or is able to perform other work available in the national economy. The appropriate remedy, therefore, is to remand this case for a further hearing to obtain vocational expert testimony regarding Plaintiff's ability to work that is based on a proper hypothetical question which clearly sets forth on the record all of the Plaintiff's physical or mental impairments or limitations.

Accordingly,

RECOMMENDATION

IT IS HEREBY RECOMMENDED that Plaintiff's Motion for Remand (#19) be **granted**, and that this matter be remanded to the Social Security Administration for a further hearing and proper vocational expert testimony as to whether Plaintiff is able to perform his past relevant work.

IT IS FURTHER RECOMMENDED that the Acting Commissioner's Cross-Motion to Affirm the Agency's Decision (#20) be **denied**.

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 13th day of February, 2014.



GEORGE FOLEY, JR.
United States Magistrate Judge